ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
GTE Corporation, Transferor,	)	CC Docket No. 98-184
And	)	
Bell Atlantic Corporation,	)	
Transferee,	)	
For Consent to Transfer Control	)	

Comments of Covad Communications Company on Applicants Supplemental Filing

Covad Communications Company (Covad) hereby respectfully submits its comments in opposition to the latest proposal by Bell Atlantic and GTE in support of FCC approval of their merger. As detailed in this filing, this latest in a series of ever-changing filings is another attempt by Bell Atlantic and GTE to convince the Commission to turn a blind eye to the plain language of section 271 of the Act. This newest proposal, as with all others submitted since the merger was announced, are indicative of Bell Atlantic's approach to the long distance restriction – ignore it, challenge it in court, try to get it changed, and then finally merge with a long distance company hoping regulators will ignore it. Because Covad relies on the section 271 process as the Bell Operating Companies' sole incentive to comply with their unbundling obligations, Covad is particularly interested in ensuring that the Commission does not sign on to Bell Atlantic's' latest gambit.

Introduction

Bell Operating Companies are prohibited by law from providing in-region, interLATA services until the Federal Communications Commission determines that they have satisfied the "competitive checklist" of section 271 of the Act. Bell Atlantic doesn't like that statutory requirement, and it has expended considerable effort in recent years in pursuit of its own "alternative" paths into the long distance market. In January 1998, for example, Bell Atlantic filed a petition for forbearance with the FCC, asking the Commission to lift the section 271 prohibition and allow Bell Atlantic to carry interLATA "data" traffic throughout its 14 state region. The FCC, recognizing that the clear language of section 10 of the Act prohibits forbearance from section 271, rejected Bell Atlantic's request.[1] Seeing that the FCC was serious about enforcing the law, Bell Atlantic decided to challenge the constitutionality of the law itself. Yet again, Bell Atlantic's effort to escape the section 271 prohibition was thwarted: the Fifth Circuit rejected the argument that section 271 of the Act was an unlawful bill of attainder.[2] Not to be dissuaded, Bell Atlantic announced its purchase of GTE, including its considerable long distance assets. When pressed by the FCC to explain how its acquisition of a long distance company before it had section 271 authority to carry long distance traffic could be approved, Bell Atlantic quickly withdrew its merger application.[3] Bell Atlantic then

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[1] *See First Advanced Services Order.*

[2] *See SBC Communications, Inc., Bell Atlantic Corp., et al. v. Federal Communications Commission*, 154 F.3d 226 (5th Cir. 1998).

[3] In Bell Atlantic's original application for transfer of control, filed in October of 1998, the entire extent of its discussion of the interLATA issue was contained in a single two sentence footnote. It read: "Bell Atlantic hopes to have needed Section 271 approvals by the time this merger closes. If that process is not complete, applicants will request any necessary transitional relief from the Commission." Application for Transfer of Control, CC Docket No. 98-194, at 19 n.14. It is interesting to note that in the nearly two years since announcing the merger with Bell Atlantic, that company clearly has continued to believe that it is more important to protect its local monopoly against competition that to take the necessary steps to enter the long distance market by complying with the Act.

took its fight to Congress, lobbying for legislation that would lift the interLATA restriction as to "data" services without requiring Bell Atlantic to actually comply with section 271.[4] Fortunately, these legislative efforts to undo the central tenets of the 1996 Act have not been successful thus far.

Now Bell Atlantic is back again. Having convinced the Commission that it will continue the process of opening its local network to competition in New York in the post-271 world (which is not yet evident to Covad) and that enforcement mechanisms will protect against future discriminatory behavior[5], Bell Atlantic now views the section 271 restrictions as unnecessary. In truth, those restrictions have never been more important. Bell Atlantic becomes more convinced every day that it can ignore its obligations under the Act, simply by promising future compliance, or, in the case of this proposed merger, by pretending that it is buying a long distance company without actually buying it. The Commission must be vigilant to ensure that Bell Atlantic remains bound by the core of the Act. Those restrictions are there for good reason, and the approval of Bell Atlantic's merger with GTE will eviscerate the measures that Congress intended to ensure the success of local competition.

There can be no question as to why Bell Atlantic wants to buy GTE. GTE is a nationwide Internet backbone provider with one of the largest and most extensive data

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[4] *See, e.g.*, H.R. 1686, 106th Congress, 1st Sess., intro. May 5, 1999, "Internet Freedom Act," (Reps. Goodlatte/Boucher) (amending section 271 so that its prohibition on BOC provision of interLATA services does not include "services that consist of or include the transmission of any data or information . . . ."); H.R. 2420, 106th Congress, 1st Sess., introduced July 1,1999, sponsored by Reps. Tauzin, Dingell, *et al.*, (amending section 271(g) to make "high speed data service or Internet access service" a permissible incidental interLATA service, and thus not subject to section 271's interLATA prohibition.

[5] It is far from clear that Covad is entitled to take advantage of those enforcement mechanisms. First, the New York Commission has not yet completed the process of developing performance benchmarks and metrics for DSL services. Second, Covad has appealed the FCC's decision to approve Bell Atlantic's section 271 application for New York, arguing that the Commission did not adequately consider the evidence Covad presented of Bell Atlantic's noncompliance with the competitive checklist. In responding

networks in the world. Bell Atlantic is not buying GTE for its local assets – it cannot seem to get rid of those fast enough.[6] Rather, as evidenced by Bell Atlantic's regulatory behavior since 1996, it wants to be in the long distance data market, and it wants to be there now.

What is the most important "public interest benefit" of this merger, in Bell Atlantic's view? "Ultimately, the combination of GTE's Internetworking business with Bell Atlantic's concentrated and business-rich customer base will afford GTE-I access to precisely the kind of customer base it needs to be a more potent competitor of the Big Three backbone providers."[7] Rhetoric or reality? Boardwatch, the industry's leading guide to the ISP industry, lists no fewer than 42 national backbone providers.[8] GTE itself is number four on that list.[9] So what is the "public interest" served by permitting GTE and Bell Atlantic to merge? In Bell Atlantic's view, it is apparently granting large businesses in Bell Atlantic's region access to GTE's backbone. The suggestion that GTE's cannot get to those customers without Bell Atlantic as a merger partner is odd,

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to Covad's request for a stay from the D.C. Circuit Court of Appeals, the FCC argued to the Court that Covad lacks standing, because Covad does not participate in the long distance market.

[6] In fact, since announcing its merger with Bell Atlantic in 1998, GTE can't seem to sell off its local exchange assets quickly enough. See the following press releases, each available at **http://www.gte.com/AboutGTE/NewsCenter/News/news.html** "GTE to sell all 58,723 customer access lines in Nebraska to Citizens Utilities for $204 million," (Sept. 21, 1999); "GTE to sell all of its Iowa local telephone properties to Iowa Network Services (INS) Inc.," (July 1, 1999); "CenturyTel, Inc., to buy all local GTE telephone properties in Arkansas for $843.3 million," (June 29, 1999); "GTE announces agreement to sell all local telephone properties in Arizona and Minnesota, certain local telephone properties in California to Citizens Utilities; ATEAC to purchase GTE's Alaska properties," (May 27, 1999); "GTE to sell some telephone properties in Wisconsin to Telephone USA of Wisconsin, LLC, and CenturyTel, Inc.," (Aug. 19, 1999); "GTE announces agreement to sell certain local telephone properties in Missouri to Spectra Communications Group, LLC," (July 8, 1999); "GTE to sell some telephone properties in Texas and all local properties in New Mexico to *dba* Communications, LLC," (Sept. 7, 1999). Given this explosion of selling, the Commission should be skeptical of Bell Atlantic's contention that "GTE's local service facilities . . . provide a springboard for the merged company's expansion on a national basis into markets outside its traditional telephone service areas." Supplemental filing at 10. Sounds good, but reality destroys the illusion.

[7] BA/GTE Supplemental Filing at 5.

[8] http://www.boardwatch.com/isp/summer99/backbones.html.

because GTE's Internet backbone is (a) headquartered in Bell Atlantic's region, and (b) nearly a third of its nationwide backbone Points of Presence (POPs) are right in Bell Atlantic's region, in Boston, New York, Baltimore, Philadelphia, Richmond, Washington, D.C., and New York City.[10] In addition, three of GTE's five major public peering points are in Bell Atlantic's region.[11] GTE is an active and vibrant participant in the interLATA data business in Bell Atlantic's region. So what are the public interest benefits of this merger? It turns out that Bell Atlantic's own interests – in marketing long distance data services to its largest business customers, most of whom are already touched by GTE's backbone – is more readily discernible. This merger is all about long distance data, and Bell Atlantic is once again trying to get into a market the law says it must not be in.

Bell Atlantic's proposed "Divestiture" is the latest, and greatest, shell game

Even since Bell Atlantic first proposed its merger to the FCC over a year ago, the company has been playing a regulatory shell game. At first, Bell Atlantic thought it could seek a waiver of the section 271 restrictions until such time as it entered the long distance market in New York.[12] After withdrawing its application and concocting several new "ideas," Bell Atlantic has now created at least the public perception that it is merging with GTE without actually buying it. Bell Atlantic has attempted to create the illusion that willingly intends to divest itself of one of the most valuable assets that GTE

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[9] *See also* BA/GTE Supplemental Filing at 5 (GTE Internetworking ("GTE-I"), which is the fourth largest Internet backbone provider . . .").

[10] http://www.boardwatch.com/isp/summer99/bb/gtepg3.html.

[11] *See id.*

[12] Of course, Bell Atlantic didn't initially disclose that this was the plan. Rather, in order to inflate the appearance of its good will, Bell Atlantic proposed that a waiver would only be necessary until it had "25% of its access lines" covered by section 271 approval. Bell Atlantic failed to note that it could meet that weak benchmark by complying with its legal obligations in only one of its 14 states – New York. Wisely, Bell Atlantic withdrew its application soon after submitting that proposal.

possesses – its data network. Even more incredibly, Bell Atlantic contends that its acquisition of GTE does not reduce Bell Atlantic's incentives to comply with the market-opening provisions of the Act. Rather, it contends that it will close the merger and resume the process of opening its local bottleneck to competition while its new long distance subsidiary gains status as a merged-but-not-really-merged entity.

Even the most cursory examination of Bell Atlantic's spin-off proposal reveals that it is a regulatory slight of hand no different from Bell Atlantic's prior proposals. First, this spin off is like no divestiture the financial markets have even seen. With this proposal, Bell Atlantic is relinquishing no more control over GTE's data operation than if the two companies were fully merged and integrated. Indeed, Bell Atlantic even concedes that it is keeping an active hand in GTE, granting itself "certain reasonable investor safeguards" such as "the right to approve certain fundamental business changes that adversely impact the value of Bell Atlantic/GTE's minority investment and conversion rights . . . ."[13] In addition, the mere fact that Bell Atlantic has the exclusive right to grab back the entire company at will makes the value of its "shares" questionable. If the shares must be, as Bell Atlantic concedes, discounted to reflect that fact, then that is all the evidence the Commission should need that Bell Atlantic is the true owner of GTE's long distance assets. In sum, this does not sound like a divestiture. It sounds like Bell Atlantic actively participating in the long distance market in violation of section 271 of the Act.

The creation of a class of shares that ostensibly are outside of Bell Atlantic control, but actually sunset when Bell Atlantic is ready to snap them back, raises an obvious question. Could this be a regime that section 271 intended to be permissible?

Can a Bell Operating Company satisfy the statutory requirement that it remain completely out of the long distance market – including refraining from jointly marketing long distance services (see U S WEST and Ameritech/Qwest) -- by buying a long distance company and creating a class of convertible shares over which it retains complete control? If a BOC can't jointly market long distance services with an interLATA carrier, how can it buy one? Clearly this is not a true spin-off of GTE, because if that were the case, it would be simpler for Bell Atlantic simply not to buy GTE in the first place.

Bell Atlantic also contends that it has structured its "divestiture" of GTE in such a way as to avoid falling within the definition of "affiliate" in 47 U.S.C. sec. 153(1). Congress included in section 153(1) sufficient protection against entities that, like Bell Atlantic, sought to structure their acquisitions of long distance entities to effect an end-run around the statute. Thus, GTE is deemed an affiliate of Bell Atlantic if the latter "own[s] and equity interest (or the equivalent thereof) of more than 10 percent." Bell Atlantic claims to only have ten percent of the voting rights in GTE-I[14], yet it grants itself "the right to approve certain fundamental business changes that adversely impact the value of Bell Atlantic/GTE's minority investment and conversion rights,"[15] a right that clearly is not afforded to most minority owners.[16] Bell Atlantic's contention that the

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[13] Supplemental filing at 34.
[14] Supplemental filing at 37.
[15] Supplemental filing at 34.
[16] Bell Atlantic and GTE argue that the Commission has concluded on prior occasions that minority owners having options and other convertible interests are not actually "owners." Supplemental Filing at 38-46. Indeed, the Commission has recognized that, it certain instances, minority holdings are not attributable in, for example, calculations broadcasting and cable interests and spectrum aggregation limits. The Commission has never before been faced, however, with such a sham transaction as proposed here. There can be no question that Bell Atlantic is merging with GTE. *See "Bell Atlantic and GTE File Formal Proposal With Federal Communications Commission*, News Releasedated Jan. 27, 2000, at 1 ("The combined company's long distance, wireless and data capabilities across Bell Atlantic's territories and GTE's national footprint promise a strong competitor . . . .") (available at

phrase "or the equivalent thereof" in section 153(1) "certainly does not expand the plain terms of the statute to encompass potential future equity interests"[17] is nonsensical. Bell Atlantic does not have a "potential future equity interest" in GTE – it has present control over the financial decisions of the company. If the Commission approves this merger, Bell Atlantic will have a "definite present equity interest" in GTE. It will own it, regardless of how it tries to hide that ownership for a period of time.

Bell Atlantic also points to the Commission's prior conclusion, in the Mass Media context, that because there is "[n]o presumption that an option will be exercised," an option is not attributable as ownership.[18] In order to take advantage of that presumption, which is in any event irrelevant to the section 271 analysis here, Bell Atlantic must be arguing that the Commission should not presume that it has any intent to actually exercise its option to "reacquire" GTE. Rather, Bell Atlantic would have the Commission believe that there is no rational "presumption" that Bell Atlantic, having expended billions of dollars to buy GTE, will fully divest itself of GTE's most valuable assets, grant itself the option of "buying" them back for nothing, and then decide in the future if it really wants to have all those assets back (for free).

Finally, Bell Atlantic proposes that it not be permitted to "buy back" GTE's long distance assets until "it receives sufficient interLATA relief."[19] It is not at all clear what exactly Bell Atlantic views as "sufficient interLATA relief." In its first merger filing, Bell Atlantic thought 25% of its access lines – the state of New York – was sufficient. Perhaps Bell Atlantic is awaiting a positive outcome for some of the anti-section 271

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http://www.ba.com/nr/2000/Jan/20000127004.htm. There can be no question that Bell Atlantic is merely putting its clear ownership of GTE's long distance network "on the shelf" in the hopes that no one will notice that Bell Atlantic still owns it.

[17] Supplemental filing at 39.

legislation it has championed. Perhaps Bell Atlantic thinks that one or two more successful section 271 applications is "sufficient" for it to enter the long distance market throughout its region. What is clear is that Bell Atlantic has no intent in satisfying the requirements of section 271 before buying a long distance company with extensive operations and assets in its monopoly states.

In sum, the issue before the Commission in this merger application is of vital importance to the future of competition in local marketplace. Bell Atlantic is presenting the latest in a long series of tricks and maneuvers designed exclusively to permit it to enter the long distance business before it is entitled by law to do so. There is no question that Bell Atlantic is buying a long distance company. There is no question that, in every state in its region except New York, Bell Atlantic is not permitted to offer long distance services. In Covad's view, there is no better incentive to convince Bell Operating Companies to comply with their bottleneck-opening obligations under the Act than the section 271 process. The Commission should reaffirm its commitment to that process by denying Bell Atlantic permission to become a long distance company before it is permitted to do so.

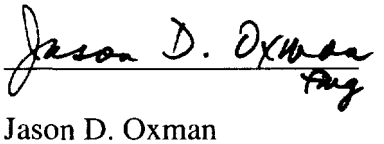
Conclusion

The Commission must stand up to Bell Atlantic and stop the evisceration of section 271 of the Act. The Commission has thus far wisely rejected all of Bell Atlantic's attempts to dart around the statute on the path to long distance entry – rejecting efforts to create a global "data LATA," and rejecting arguments that section 271 doesn't apply to data services. If there is any doubt that Bell Atlantic still owns GTE's long

[18] Supplemental filing at 41, citing WWOR-TV, Inc., 6 FCC Rcd 6569, n.13 (1991).
[19] Supplemental filing at 3.

distance assets despite the appearance of divestiture, there is only a short series of questions to ask. Would Bell Atlantic buy GTE without its extensive long distance and interLATA data operations? Clearly not, or Bell Atlantic would not be jumping through such hoops to keep them. Would Bell Atlantic buy GTE and immediately get rid of those long distance assets? Clearly not, or Bell Atlantic would do that now to avoid the only real regulatory hurdle to approval of this merger. Should we believe then that Bell Atlantic is not the owner of GTE's long distance assets when it issues these phantom shares and gives itself full buyback rights to the majority of the company, while maintaining decision-making control in the interim? Clearly not. The Commission must not now abandon its commitment to the full implementation of section 271 and the market-opening provisions of the Act. It must not permit Bell Atlantic to become a long distance company before it is time.

Respectfully submitted,



Jason D. Oxman
Senior Government Affairs Counsel
Covad Communications Company
600 14th Street, N.W., Suite 750
Washington, D.C. 20005
Phone: (202) 220-0409
Fax: (202) 220-0401
Email: joxman@covad.com